92-770

Supreme Court, U.S
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No.

In The

Supreme Court of the United States

October Term, 1992

GORDON S. RUSSELL and JEAN B. RUSSELL,
Petitioners,

vs.

BOARD OF APPEALS OF TRURO, DONALD BELISLE, LINNETT HULTIN, ROBERT WEINSTEIN, LLOYD ROSE, DAVID CONNOR, LYNNE TUDOR, and MARGARET MARY MCOWEN-HANELT,
Respondents.

Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a state court of last resort violate fundamental principles of due process and the rights of innocent litigants when it exercises discretionary jurisdiction in order "to emphasize the duties of counsel to expedite appeals," but then declines to afford an evidentiary hearing to determine whether an alleged lack of diligence occurred through the ignoring of oral notice of crucial procedural step in perfecting an appeal where receipt of that notice was put in issue by a counteraffidavit which controverted an affidavit alleging that such notice had been given to an unnamed woman in counsel's office on an unspecified day?

2. Did a state court of last resort violate fundamental principles of due process when it failed to require an evidentiary hearing by a lower court to determine issues of credibility raised by conflicting affidavits where (1) the determination of those issues by the trial court by simply choosing one affidavit over another resulted in a final disposition of the litigation, and (2) the determination of those issues meant that a burden of proof had been carried *sub silentio* in that manner?

3. Where proof of an allegation of lack of diligent prosecution of an appeal depends entirely upon the resolution of an issue of credibility (namely, whether or not notice was given orally of an integral procedural step in that appeal), can a state court of last resort constitutionally treat the determination of that allegation as a matter of discretion to be exercised by the trial court in choosing, as it may, which of two conflicting affidavits to believe?

4. Where a state court rule of appellate procedure imposes an obligation upon the trial court clerk's office to provide appellants' counsel a cassette copy of the electronic recording of the proceedings in the trial court, does it follow as a matter of due process that the burden of proof is upon anyone seeking to show

compliance with that obligation to establish that, at a minimum, notice of the availability of such a cassette in the clerk's office was duly given to petitioners' counsel?

5. Is it constitutionally sufficient to invoke a need for an evidentiary hearing, including the right to cross-examine, to simply file a counteraffidavit (without an express request for such a hearing) as to a fact essential to the preservation of a right of appeal in a state court proceeding, if that counteraffidavit legitimately raises issues of credibility for determination?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Gordon S. Russell and Jean B. Russell, herewith pray for the issuance of a writ of certiorari to the Massachusetts Supreme Judicial Court to review its decision of August 5, 1992, denying petitioners' petition for rehearing of a decision rendered July 16, 1992.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court has

been reported in 413 Mass. 106, 595 N.E. 2d 766 (1992), and is reproduced herein as Appendix A.

STATEMENT OF JURISDICTION

The judgment of the Massachusetts Supreme Judicial Court was entered on July 16, 1992. Review of that judgment was timely sought by filing a petition for rehearing in the form specified by that court, which petition was denied on August 5, 1992.

This Court has jurisdiction to review, through certiorari, the decision of the Massachusetts Supreme Judicial Court pursuant to 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . . .

The relevant portions of the Massachusetts Rules of Appellate Procedure, referred to throughout, are reproduced in Appendix B hereto.

STATEMENT OF THE CASE

The petitioners, a retired electrician and his wife, brought a *de novo* proceeding in a municipal court of the Massachusetts Trial Court Department challenging the grant by a local zoning board to an abutting landowner, of a special permit authorizing the complete reconstruction into a year-round residence of a long-uninhabitable and seriously non-conforming summer cottage. The trial court proceeding, which resulted in a judgment on August 8, 1990 in favor of the abutting landowner, was, as authorized by Massachusetts Rule of Appellate Procedure (Mass. R.A.P.) 8(b)(3)(i), electronically recorded by a court clerk on equipment under the court's control.

Under Mass. R.A.P. 9(c)(2), an appellant must, within forty days after filing a notice of appeal, file with the clerk of the lower court either a transcript (or necessary parts thereof) or a certificate that the transcript has been ordered from the court reporter. However, if the proceedings are not taken stenographically, but are recorded electronically, Mass. R.A.P. 8(b)(3) applies. That rule requires an appellant, simultaneously with filing the notice of appeal, to order from the clerk a cassette copy of the electronic recording. The rule requires the clerk to "provide" the appellant promptly with the cassette. The appellant has fifteen days from "receipt of the cassette from the clerk" to designate the parts of the cassette to be transcribed. Counsel for the petitioners here, simultaneously with filing the notice of appeal, submitted a written request to the trial clerk for a cassette copy of the electronic recording.

The cassette became available to the trial clerk some time during the week of September 17, 1990. On October 22, 1990, more than forty days having elapsed since the claim of appeal, the abutting landowner moved to dismiss the petitioners' appeal, for failure to comply with Mass. R.A.P. 9. The motion was

accompanied by two affidavits, the critical one being by an assistant clerk in the trial court's clerk's office that he had "received the cassette during the week of September 17th; that [he then] telephoned the office of . . . [the petitioners'] attorney immediately upon . . . [his] receipt of the cassette, which is . . . [his] usual and customary practice;" and that he "spoke to [a] woman at the . . . office and left the message [with her] that the cassette was ready," [and] told her what the charge for it was.[1]

The docket, however, contains no entry relating to notice having been given by the clerk to the petitioners of the availability of the cassette. Nor was any record appended to the clerk's affidavit of a long-distance toll call having been made from the clerk's office to the office of the petitioners' counsel.[2]

On October 24, 1990, the petitioners filed an opposition to the motion to dismiss, together with an affidavit of their counsel, stating (in part) that he had been awaiting notice from the clerk of the availability of the cassette; that it was his understanding that, in response to his outstanding request, the cassette would be sent to him along with a bill for its cost; that he had not received the cassette; that the first notice he had about the cassette was service upon him of the affidavit of opposing counsel; that he received no

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1. A discrepancy exists between this affidavit and a prior hearsayaffidavit which had been submitted by respondent's counsel. In that earlier affidavit, the assistant clerk was represented as having given telephone notice on September 17, 1990, but in fact the cassette had not been received by the trial court until some time after that date. The affidavit by the assistant clerk corrected this obvious error in the first affidavit.

2. The primary office of the petitoners' counsel is in Boston, and he maintains a satellite office in North Truro on Cape Cod. A call to either involved a long-distance toll charge from the trial court's location in Orleans, Massachusetts.

telephone call or message from the clerk's office about the tape on September 17 or at any other time; that a telephone log is kept of all calls incoming to his office and not answered by him, and the log reflected no call from the clerk. Along with the affidavit, petitioners' counsel filed another request for the cassette, which he then received, and he promptly had a transcript prepared.

In the interim, however, on November 5, 1990, the trial court judge heard the abutting landowner's motion to dismiss the pending appeal and granted it without an evidentiary hearing.[3] The petitioners appealed the November 5 order dismissing their appeal from the zoning decision. The appeal of the dismissal was duly entered in the Massachusetts Appeals Court. The Massachusetts Supreme Judicial Court, however, transferred the case to that court on its own motion "to emphasize once again the appellant's responsibilities for providing transcripts of lower court proceedings that were recorded electronically." *Russell v. McOwen-Hanelt*, 413 Mass. 106, 107, 595 N.E. 2d 766, 767 (1992).

The seven justices of the Supreme Judicial Court split four-to-three.[4] The majority found that Rule 9(c)(2) of the Mass. R.A.P. had not been complied with, because the petitioners had not within forty days either certified that the cassette was being transcribed or submitted the transcript. 413 Mass. at 110, 595 N.E. 2d at 769. The majority went on to find that this conduct constituted "inexcusable neglect" because the trial court had found that "the assistant clerk did not notify the plaintiff"s counsel's office of the availability of

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3. The petitioners filed a motion for reconsideration as well as a motion requesting an evidentiary hearing, affidavits from four female employees in counsel's two offices, and a motion for leave to conduct discovery as to the relevant telephone company records. The judge denied reconsideraiton.

4. The case was argued before a panel of five justices. It was referred to the court *en banc* without notice to counsel or an opportunity for further argument.

the tape." *Ibid.* To the petitioners' argument that the judge should have conducted an evidentiary hearing rather than rely on the contested affidavit by the assistant clerk, the majority held that the "judge did not abuse his discretion by relying on the affidavits." 413 Mass. at 111, 595 N.E. 2d at 769. The majority also held that since the petitioners requested an evidentiary hearing only after the trial court had granted the motion to dismiss, "that issue is not properly raised." *Ibid.*

The majority opinion did not address the issue of the burden of proof. The opinion did concede that the relevant appellate rule provides that, once the cassette has been ordered, "[r]ule 8(b)(3)(ii) places a responsibility on the clerk to provide the cassette promptly to the appellant." *Ibid.* It also conceded that written notice on a standard form would have been preferable, or that at least a docket entry might have been made that notice had been given. *Ibid.* Nevertheless, the majority held that, even assuming that the duty properly to notify the petitioner's counsel had been breached, the neglect was inexcusable because of the trial judge's finding that counsel was on notice that the cassette was available within the forty-day period. 413 Mass. at 111, 595 N.E. 2d at 770.

The dissenting judges pointed out that Mass. R.A.P. 9(c)(2) "neither expressly nor implicitly gives the slightest hint that it applies to electronically recorded proceedings." 413 Mass. at 112, 595 N.E. 2d at 770. Furthermore, they argued, "the retention or loss of appellate rights should not depend on the resolution, without an evidentiary hearing, of a critical and contested factual question about whether an undocketed and unwritten notice via the telephone was or was not given by a clerk to an appellant's counsel." *Ibid.* So far as the dissent was concerned, the majority had created a trap for the unwary evocative of the bad old days when civil procedure was used as a weapon for avoiding the resolution of controversies on their merits.

The petitioners filed a motion to reconsider. The motion specifically directed the Supreme Judicial Court's attention to the argument that mandates of "due process prevented the District Court judge from simply opting for one affidavit over another." The court denied the motion for reconsideration. This petition followed.

REASONS FOR GRANTING THE WRIT

I.

PROCEDURAL DUE PROCESS WAS VIOLATED WHEN THE MASSACHUSETTS TRIAL COURT DECIDED AN ISSUE OF CONTESTED FACT, CRUCIAL TO PETITIONER'S RIGHTS, BY ARBITRARILY SELECTING ONE AFFIDAVIT OVER ANOTHER WITHOUT CONDUCTING AN EVIDENTIARY HEARING AND IN DISREGARD OF THE BURDEN OF PROOF.

The crucial issue before the state supreme court was whether the clerk had fulfilled his responsibility "to provide the cassette promptly to the appellant." Mass. R.A.P. 8(b)(3); 413 Mass. at 111, 595 N.E. 2d at 770. The majority noted that there was some question about whether that step had been properly taken, but concluded that, even if it was assumed that the responsibility had not been met by giving undocumented oral notice, the possible breach of the "duty properly to notify the plaintiff of the cassette's availability" was irrelevant because "the plaintiff's neglect would not be excusable." *Ibid.* The basis for the conclusion of neglect was said to be that "[t]he [municipal court] judge found that the cassette was available within the forty-day period [for taking action with respect to a transcript] and that counsel was so notified." *Ibid.*[5]

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5. The majority's consideration of the notice question appears to be inherently inconsistent. On the one hand, the majority concedes that there is enough doubt about whether notice of the cassette's availability had been properly given that it ultimately bases its affirmance of the dismissal on the alleged misconduct of counsel. On the other hand, that very misconduct is then taken to have been established by the trial court's finding that counsel did receive notice (and presumably ignored it). Thus, the receipt of the self-same notice which is recognized to be potentially inconclusive on the issue of whether the cassette was provided in a timely manner is nevertheless treated as conclusive on the issue of counsel's conduct.

That finding of the municipal court judge, however, was made without an evidentiary hearing and solely by preferring one affidavit over another that notice had been timely given of the availability of the cassette of the trial testimony for transcription. As a result, the finding was made in a way which violated the petitioners' right to procedural due process. That right was succinctly stated by Chief Justice Hughes in *Railroad Comm. of Cal. v. Pacific Gas & Elec. Co.*, 302 U.S. 388, 393 (1938), 82 L. Ed. 319, 58 S. Ct. 334, in the following terms: "There must be due notice and an opportunity to be heard, the procedure must be consistent with the essentials of a fair trial, and the [finder of fact] . . . must act upon evidence, and not arbitrarily." The proceedings in the municipal court, as challenged by petitioners and subsequently approved by a 4-to-3 majority of the Supreme Judicial Court, did not involve testimony and an opportunity to conduct cross-examination on an essential contested fact, and thereby violated the "right to a fair and open hearing," which is "one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." *Ibid.*

Petitioners' rights to continue their zoning appeal were terminated by the trial judge's action.[6] The only support for the trial judge's action in dismissing the appeal were two affidavits which, though inconsistent with each other about when notice had allegedly been given, purported to establish that it had been given orally to a "woman" in the office of petitioners' counsel. The obvious purpose of the supporting affidavits was to raise an

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6. This disposition contrasts starkly with the well-established judicial philosophy that loss of rights on procedural grounds should be avoided whenever possible. Even "a clear and unacceptable disregard for . . . rules of appellate procedure . . . not . . . shown to be willful" does not normally result in the first instance in "the extreme measure of dismissal." *Patrick v. John Odato Water Serv.*, 767 F. Supp. 107, 109 (D.V.I. 1991) (failure to assist trial court clerk in assembling the record).

inference that petitioners' counsel had ignored timely oral notice given to a member of his staff. That inference, however, assumed that oral notice was sufficient. *But see Holcomb v. Allis-Chalmers Corp.*, 774 F.2d 398, 401 (10th Cir. 1985) (telephone notice to counsel that certain depositions be taken did not comport with due process). It further assumed that notice to counsel's office, rather than to counsel himself, was sufficient despite the fact that literal compliance with the Massachusetts appellate rule would require the clerk's office, upon request, to provide directly to petitioners' counsel the cassette recording of the trial proceedings for transcription.[7]

The motion to dismiss was contested on the basis of an affidavit by petitioners' counsel that neither he nor any of his staff had ever received such notice. The assistant clerk's affidavit did not identify any particular day on which he had called counsel's office, nor any particular person (beyond a "woman") to whom he had allegedly spoken in counsel's office. The assistant clerk had relied in his affidavit solely upon his customary practice of giving oral notice immediately after he received the cassette copy from the repository where the tape had been stored following the trial.

Thus, counsel's affidavit "met," as best it could, the clerk's affidavit, and created a legitimate issue of fact about whether oral

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7. The Supreme Judicial Court's majority opinion assumed without discussion, as did the trial court, that oral notice of the availability of the cassette recording sufficed rather than physical delivery of the cassette to petitioners' counsel, as the wording of the applicable appellate rule seemingly mandated. For purposes of this petition, the petitioners assume that the interpretation given to a state rule of appellate procedure by that state's highest court will be given great, normally even controlling weight, unless that interpretation creates due process problems. Petitioners assume that notice to counsel's office, if reasonably calculated to be received, would be constitutionally sufficient to meet the literal obligation to "provide" the cassette to counsel.

notice had been given. The disposition of that issue necessarily turned on matters of credibility.

On such a record, the allowance of the motion to dismiss without conducting an evidentiary hearing about whether notice was in fact given orally can only be seen as arbitrary. There was no rational basis for preferring the affidavit of the clerk over the affidavit of counsel; both were officers of the court charged with a duty of fidelity to the court.

If oral notice to counsel's office was to be sufficient to show a negligent failure to act upon it, it needed to be established by the assistant clerk's affidavit in a way which avoided issues of credibility. In the actual event the clerk had not confirmed the oral notice in writing, nor had he even made note of the telephone number called or of the name of the person to whom he had spoken.[8] Nor did the clerk even take the minimal step of making a contemporaneous docket entry of his call. His statement that he had given notice to some unnamed woman at some unknown telephone number at some unstated time on some unspecified day, although susceptible of corroboration, was wholly uncorroborated, and at best entitled to no greater credibility than counsel's affidavit that none of his female employees had taken such a call, as reflected in the telephone records of his office.

The petitioners' appellate rights hinged on whether timely oral notice had been given to their counsel. In such a setting, absent an express waiver of an evidentiary hearing, petitioners submit that the trial court was not at liberty to determine that notice had been given by following a procedure which consisted of simply accepting the clerk's affidavit over that proffered by petitioners'

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8. As previously noted, a call from the Clerk's Office to either office of petitioner's attorney would have generated a toll charge, but no corroborating telephone record was attached to the clerk's affidavit.

counsel. Due process required an evidentiary hearing to resolve the disputed issue of receipt. This was so because:

1. The burden of proof was upon the party seeking dismissal of the appeal to show that notice of the availability of the cassette had been recieved.

2. The "proof" of notice was a self-serving affidavit by the very person whose obligation it was to give notice.

3. The alleged notice was given orally.

4. The affiant relied upon his "customary practice" rather than upon some specific memory.

5. The oral notice was constructive; it was allegedly given not to the person entitled to receive it (petitioners' counsel), but to a "woman" in his office.

6. No contemporaneous entry was made upon the docket or otherwise.

7. Telephone records were collaterally available to show whether or not a telephone call had in fact been placed to petitioners' office during the week in question.

8. The clerk had given a somewhat inconsistent account of his actions to respondent's counsel, as reflected in an initial affidavit by the latter which was clearly impeached by the fact that the cassette copy had not been mailed *to* the clerk until the date on which he had first claimed to have given oral notice.

Petitioners submit that the trial court's crediting its own clerk's affidavit in these circumstances preempted petitioners'

"right to a fair and open hearing," including the right to cross-examine the asistant clerk. Within Chief Justice Hughes' rubric, petitioners were not afforded the "rudiments of fair play" by such a procedure. *Railroad Comm. of Cal., supra.* 302 U.S. at 393.

A. The Majority's Holding Ignored the Burden of Proof Imposed by the Obligation to Provide the Cassette to *The Petitioner.*

It may not be immediately recognized that the respondents had the burden of proof before the municipal court judge. However, as the majority of the Massachusetts Supreme Judicial Court explicitly stated, the appellate rule in question put the responsibility of providing the cassette to the petitioner on the clerk. The petitioners submit that, as a consequence, the burden of proof on the question of notice was on the party seeking dismissal of petitioners' appeal to show that the clerk had fulfilled this responsibility.

The only "evidence" that the responsibility had been discharged was the clerk's self-serving, uncorroborated affidavit that he had given telephone notice to the unnamed "woman in the office of plaintiff's counsel." Once petitioners' counsel denied by sworn affidavit that he or his office had received notice, due process dictated that an evidentiary hearing be held to resolve the disputed factual issue; the assistant clerk's contested affidavit could not constitutionally satisfy the burden of proving that notice had been given.

Nothing in the record enabled the judge to resolve the factual issue of credibility raised by the conflicting affidavits without an evidentiary hearing. *Compare Moore v. Ross,* 687 F.2d 604, 607 (2d Cir. 1982), *cert. denied,* 459 U.S. 1115, 103 S. Ct. 750, 74 L. Ed. 2d 969 (1983) (administrative law judge could reverse judgment of state unemployment insurance appeal board without a *de novo* hearing, at least where the judge relied on "derivative

inferences" from evidence in the record). Indeed, the factual dispute turned solely on resolving issues of credibility as to whether oral notice had been given to a proper person. There was no rational basis to hold that the assistant clerk's uncorroborated affidavit was more credible than counsel's, and thereby satisfied the burden of proving that notice had in fact been given.

The majority opinion of the Supreme Judicial Court did not discuss the burden of proof, but simply announced the proposition, unsupported by any citation of authority, that the trial judge had "discretion" to choose one affidavit over another. Such "discretion" seriously undercuts established concepts of procedural due process. Procedural due process requires that where cross-affidavits raise a legitimate issue of credibility, a state court may not terminate a litigant's rights by selecting one conflicting affidavit over another in disregard of the burden of proof and without requiring witnesses to testify under oath before them and to have their credibility subjected to impeachment by cross-examination.

By addressing the issue for its decision in terms of "discretion," the majority of the Supreme Judicial Court obscured the premises of its position. The majority — in order to reach an issue of "discretion" — necessarily had to conclude, first, that the right to an evidentiary hearing had been waived, and, second, that the responsibility to "provide" the cassette did not impose any limitation upon the ability of the trial judge to choose whichever affidavit he preferred.

The majority's conclusion that the petitioners waived an evidentiary hearing disregards the time-honored function of filing a counteraffidavit to a motion supported by an affidavit, which is to establish that a factual dispute exists requiring for its resolution an evidentiary hearing. Equally important, in empowering the trial judge to choose as he might, in the face of conflicting affidavits,

the majority ignored the fact that the party seeking dismissal had the burden of showing that it was more likely than not that its clerk had indeed made the cassette available to petitioners' counsel in a timely and reasonable manner.

Faced with two conflicting affidavits and the burden of proof, the trial court's only available option was to hold an evidentiary hearing and provide petitioners an opportunity to test credibility with cross-examination and contradictory evidence. Only thus could have been avoided the totally arbitrary outcome which occurred in this case.

So, even if a waiver of an evidentiary hearing could have been fairly implied, the mere existence of the conflicting affidavits foreclosed the trial court from simply opting for one affidavit over another. To avoid a totally arbitrary result, the trial court was obliged by traditional principles of due process to conduct an evidentiary hearing regardless of whether petitioners' counsel had expressly called for it.

One of the most troublesome aspects of the decision below emerges from the foregoing analysis. This Court is faced with a situation where "the appearance of justice" has been denied by what can unfortunately be seen as a judicial cover-up. Unlike many factual disputes, there is almost certainly an answer here. There is every reason to believe that telephone company records will show whether the disputed telephone call was or was not made by the assistant clerk. Yet the trial court's action foreclosed discovery of those records in its clerk's custody, and the majority of the Supreme Judicial Court supported that denial when it implied what amounted to a waiver of an evidentiary hearing from the fact that petitioners' counsel had opted in the first instance for the classically sufficient maneuver of filing an affidavit controverting that submitted by the assistant clerk.

Judicial cover-ups are even more to be deplored than political cover-ups, since the judicial system is the ultimate recourse when an attempt to mask the truth is made. This case calls out for a full venting of all of the available facts. As the three dissenters pointed out, its outcome should not turn upon choosing between affidavits as to whether a phone call was or was not made.

B. The Petition Raises Issues Worthy of This Court's Review.

Petitioners recognize that this is a humble case which has arisen in a thoroughly mundane form of litigation — a zoning controversy conducted in a muncipal court on the end of Cape Cod. Yet, as this Court observed in *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971), "It is significant that most of the provisions of the Bill of Rights are procedural, for it is procedure that marks much of the difference between rule by law and rule by fiat."

The loss of the petitioners' appellate rights here mocks the simple, but noble, words of Justice Harlan in *Boddie v. Connecticut*, 401 U.S. 371, 375 (1971):

> American society ... bottoms its ... machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implemention of a regularized, orderly process of dispute settlement. Within this framework ... those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system .... [W]ithout due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by

> providing that the social enforcement mechanism must function strictly within these bonds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Petitioners recognize, of course, that this Court's obligations require it to be extraordinarily chary of its resources, and to reserve the exercise of its jurisdiction for disputes of truly national significance. Yet, undergirding the exercise of that jurisdiction must ever be an alertness to the necessity in a democratic society for rigorously ensuring evenhanded fairness in the administration of judicial business for all manner of litigants.

In this instance the Supreme Judicial Court of Massachusetts reached out, *sua sponte*, and exercised a discretionary jurisdiction to review this case in order "to emphasize once again an appellant's responsibilities for providing transcripts of lower court proceedings that were recorded electronically." 413 Mass. at 107, 595 N.E. 2d at 767. In doing so, those who wanted to teach a lesson to the Massachusetts Bar created a profound division in their own ranks over the need for an evidentiary hearing, a division which resulted for the dissenters in the creation of a "trap for the unwary," totally unworthy of the 300-year tradition of that court for justice and fairness.

It is not, of course, the creation of that trap which raises petitioners' primary constitutional concern, although the writ might arguably be granted on that premise alone. It is the method of creating that trap — the process by which the trial court was allowed to make the crucial finding that petitioners' counsel should have known that the cassette was available — which raises the constitutional alarm.

There were other, less Draconian, methods of instructing the bar in its responsibilities than to terminate a legitimate appeal by arbitrarily preferring one affidavit over another in a situation where an evidentiary hearing should have been granted as a matter of course. Although this is a simple case, one cannot overemphasize the perils which arise when a court of last resort reaches out to teach a lesson to its bar and in so doing rides roughshod over due process. It is a very serious matter — fully worthy of this Court's attention — that the court did so merely to "emphasize" the point that it expects appellants' counsel to expedite appeals. In making an example of what the majority felt to be lack of diligence on the part of counsel, it violated the rights of the clients concerned to an evidentiary hearing on whether any such dereliction had in fact occurred.

CONCLUSION

Petitioners respectfully pray that the petition be granted.

Respectfully submitted,

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APPENDIX A — APPLICABLE OPINIONS AND JUDGMENTS

[106] GORDON S. RUSSELL & another[1] *vs.* MARGARET MARY McOWEN-HANELT.

Barnstable. February 4, 1992. - July 16, 1992.

Present: LIACOS, C.J., WILKINS, ABRAMS, NOLAN, LYNCH, O'CONNOR, & GREANEY, JJ.

Practice, Civil, Appeal, Dismissal of appeal, Transcript of testimony. *Rules of Appellate Procedure.*

In a civil action where trial proceedings were electronically recorded, Mass. R. A. P. 9 (c) (2) required that the appellants deliver either a transcript, or a signed statement certifying that the cassette tapes were being transcribed, to the clerk of the trial court within forty days after filing their notice of appeal, and, where the record of the proceedings supported the trial judge's findings that the appellants did not comply with this requirement of rule 9 (c) (2), that their failure to comply was not due to excusable neglect, and that they did not cure the defect in a timely manner, the judge properly dismissed the appeal pursuant to Mass. R. A. P. 10 (c). [109-111] O'CONNOR J., with whom WILKINS & GREANEY, JJ., joined, dissenting.

The court declined to reinstate an appeal properly dismissed for failure to comply with Mass. R. A. P. 9 (c). [111]

The court declined to award damages under Mass. R. A.

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1 Jean B. Russell. The plaintiffs, husband and wife, are residents of Truro.

Appendix A

P. 25, where the issue raised by the appeal in a civil action was not frivolous. [111-112]

CIVIL ACTION commenced in the Orleans Division of the District Court Department on June 21, 1989.

The case was heard by *John P. Curley, Jr.*, J., and a motion to dismiss the plaintiffs' appeal was heard by *Robert B. Champagne*, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Charles S. Cohen (*Ansel B. Chaplin* with him) for the plaintiffs.

[107] *Peter S. Farber* for the defendant.

LIACOS, C.J. The plaintiffs, Gordon S. and Jean B. Russell, challenge the dismissal of their appeal from a judgment of the District Court. The underlying case arose from the grant of a special permit by the board of appeals of Truro (board)[2] to the defendant McOwen-Hanelt. Before us is only the procedural issue whether the dismissal of the appeal was proper; the merits of the underlying zoning dispute are not before us. We transferred the case to this court on our motion, to emphasize once again an appellant's responsibilities for providing transcripts of lower court proceedings that were recorded electronically. We affirm. Since we have determined the issue at hand to require judicial determination, we deny the motion for damages and costs filed by the defendant McOwen-Hanelt under Mass. R. A. P. 25, as

2 The board of appeals of Truro is not a party to the appeal. However, the board sought to join in the defendant's brief. See Mass. R. A. P. 16 (j), 365 Mass. 860 (1974).

amended, 378 Mass. 925 (1979).

1. *Procedural history.* The plaintiffs filed a complaint in District Court on June 21, 1989, seeking de novo review of a decision by the board to grant McOwen-Hanelt a special permit for the use of her land. A trial was conducted, the proceedings of which were recorded electronically. On August 8, 1990, judgment was entered in favor of the defendants.

The plaintiffs' filed a timely notice of appeal from the judgment on August 27, 1990. In accordance with Mass. R. A. P. 8 (b) (3) (ii), as amended, 388 Mass. 1106 (1983),[3] the plaintiffs also submitted a request to the clerk of the lower court for a cassette copy of the electronic recording of the [108] trial proceedings.[4] As later found by a judge of the District Court, the cassette became available during the week of September 17, 1990, and the clerk's office so notified the plaintiffs' counsel. The plaintiffs deny receipt of that notice. On October 22, 1990, the defendant filed a motion to dismiss the appeal, pursuant to Mass. R. A. P. 10 (c), as amended, 378 Mass. 937 (1979),[5] arguing that the plaintiffs had failed to

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3 Rule 8(b) details the procedures by which a transcript of trial proceedings is made available for inclusion in the record on appeal. Rule 8 (b) (3) (ii) & (iii) lists the responsibilities of the appellant and of the clerk in cases where the proceedings were recorded electronically rather than by an official court reporter. Simply put, the rule requires that the appellant obtain a copy of the recording from the clerk, designate the portions for transcription (providing the appellee an opportunity for counterdesignation) and then arrange for the relevant portions of the recording to be transcribed.

4 Rule 8 (b) (3) (ii) refers to this copy simply as "the cassette." We shall do the same.

5 Rule 10 (c) of the Massachusetts Rules of Appellate Procedure, as amended, 378 Mass. 937 (1979), reads as follows:

(Cont'd)

comply with Mass. R. A. P. 9 (c) (2), as amended, 378 Mass. 935 (1979),[6] which requires appellants within forty days of filing an appeal[7] either to submit a transcript to the clerk of the lower court or to certify that the transcript is being prepared. A judge of the

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(Cont'd)

"Dismissal for Failure of Appellant in a Civil Case to Comply With Rule 9 (c) or Rule 10 (a). If any appellant in a civil case shall fail to comply with rule 9 (c) or rule 10 (a) (1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion, the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely."

6 Rule 9 (c) of the Massachusetts Rules of Appellate Procedure, as amended, 378 Mass. 935 (1979), reads in pertinent part as follows:

"(c) Appellant's Obligation.

"(1) *In General.* In a civil or criminal case, upon request by the clerk of the lower court, the appellant shall forthwith perform any act reasonably necessary to enable the clerk to assemble the record and the clerk shall assemble a single record."

". . .

"(2) *Civil Cases.* Notwithstanding any other obligation which these rules may impose each appellant in a civil case shall within forty days after filing a notice of appeal, deliver to the clerk of the lower court either (i) a transcript of those portions of the transcript of the lower court proceeding which the appellant deems necessary for determination of the appeal, or (ii) a signed statement certifying that the appellant has ordered such portions from the court reporter. Upon receiving the transcript, the appellant in a civil case shall forthwith deliver it to the clerk of the lower court."

7 In this case, the forty days provided in rule 9 (c) (2) expired on October 6, 1990.

District Court held a hearing [109] on this motion on October 29, 1990. Between the filing of the motion and the holding of the hearing, the plaintiffs filed an opposition to the motion; they also filed a new request for the cassette, and they received the cassette during this time period. On the basis of affidavits filed by both parties, the motion to dismiss was granted on November 5, 1990. The plaintiffs nevertheless continued to prepare a transcript, and they filed a motion for reconsideration as well as a motion requesting an evidentiary hearing. On April 1, 1991, the motion for reconsideration was denied.

2. *Dismissal of appeal pursuant to rule 10 (c).* "The test to determine whether the judge was warranted in dismissing the plaintiff's appeal is whether he abused his discretion." *McCarthy v. O'Connor,* 398 Mass. 193, 196 (1986). Represented by additional counsel, the plaintiffs argue (1) that they did comply with rule 9 (c); (2) that they cured any defect before the hearing on the motion to dismiss; and (3) that any procedural missteps were the product of excusable neglect. The record does not support these arguments.

a. *Compliance with rule 9 (c).* The judge found that the plaintiffs did not comply with rule 9 (c) (2). Rule 9 (c) (2) requires an appellant in a civil case to take one of two actions within forty days of filing of a notice of appeal; (1) deliver a transcript of the lower court proceedings to the clerk; or (2) file a signed statement certifying that the transcript has been ordered "from the court reporter." In cases where the proceedings have been electronically recorded, there is of course no court reporter. As a result, the plaintiffs argue, the requirement of notifying the clerk that the transcript has been ordered from the court reporter translates into a requirement of notifying the clerk that the cassette has been requested (which the plaintiffs claim they did). This argument is incorrect. In a case where trial proceedings have been

electronically recorded, rule 9 (c) (2) "require[s] the [appellant] to deliver either a transcript or a signed statement certifying that the tapes [are] being transcribed, to the clerk or register's office, [no later than] forty days after [the] appeal was filed." *Hawkins v. Hawkins*, 397 Mass. 401, 406 [110] (1986). See *McCarthy, supra* at 198 (in case where proceedings were electronically recorded, plaintiff could not argue that "she delivered a transcript to the [clerk] within forty days after she filed her notice of appeal, or that within that period she delivered to the [clerk] a signed certification that she had ordered a transcript"). The plaintiffs did not certify within forty days that the cassette was being transcribed nor did they submit the transcript. They did not comply with rule 9 (c).

Under rule 10 (c), failure to comply with rule 9 (c) is a ground for dismissal; however, the judge may not dismiss the case if the appellant cures the defect before the hearing on the motion to dismiss or if the defect was due to excusable neglect.

b. *Failure to cure defect.* Prior to the hearing on the motion to dismiss, the plaintiffs neither filed a transcript with the clerk nor filed a signed statement certifying that the transcript had been ordered. Therefore, they did not cure their defect within the time allowed by rule 10 (c).[8]

c. *Inexcusable neglect.* The judge found that the plaintiffs' failure to comply with rule 9 (c) (2) was due to "inexcusable neglect." The plaintiffs challenge this finding, arguing in essence

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8 Citing *Springfield Young Women's Christian Ass'n v. Evers*, 30 Mass. App. Ct. 921 (1991), the plaintiffs argue that they did cure their error prior to the hearing on their motion to reconsider, and therefore that their compliance with the rule should be deemed timely. In the cited case, however, the motion to reconsider was granted, thereby "vitiat[ing] the original order of dismissal." *Id.* at 922. In the instant case, the motion for reconsideration was denied, leaving the original dismissal intact.

that their neglect was due to the failure on the part of the clerk of court to provide them with the cassette on request. "We have said that an appeal should not be dismissed for failure to follow the rules of appellate procedure if the error was not attributable to the appellant." *Hawkins, supra* at 408.

We begin with the finding of the judge that the assistant clerk did not notify the plaintiffs' counsel's office of the availability of the tape. The plaintiffs contest this finding and argue [111] that the judge should have conducted an evidentiary hearing rather than rely on the affidavits filed. The judge did not abuse his discretion by relying on the affidavits. The plaintiffs requested an evidentiary hearing only after the judge granted the motion to dismiss, so that issue is not properly raised. There was no clear error in the judge's finding. See *Tammaro v. Calarusso*, 11 Mass. App. Ct. 44, 47 (1980). We note that rule 8 (b) (3) (ii) places a responsibility on the clerk to provide the cassette promptly to the appellant. While it might be preferable for the clerk to provide written notice on a standard form, or to make a docket entry that notice has been given, even if we assume that the clerk's office somehow had breached its duty properly to notify the plaintiffs of the cassette's availability, the plaintiffs' neglect would not be excusable. Rule 9 states that its provisions apply regardless of the provisions of other rules. We have repeatedly said that the burden of pursuing an appeal falls on the appellant. As the end of the forty-day period following the filing of an appeal approaches, the appellant has a responsibility to take action designed to have a transcript available. Of course, if the appellant is unable to obtain the cassette from the clerk, any neglect may be excusable, but in this case, the judge found that the cassette was available within the forty-day period and that counsel was so notified.

We conclude by noting that we could reinstate this appeal

despite the fact that there was no error below. See Mass. R. A. P. 3 (a), as amended, 378 Mass. 927 (1979). However, as the defendant has been prejudiced by her inability to use her land, as the plaintiffs did not cure their mistakes before the hearing or even begin to provide for a transcription, and as the plaintiffs have provided far too little information for us to determine whether there is any merit to their claim, we shall not invoke our equitable powers. See *Hawkins, supra* at 409.

3. *Damages.* The defendant requests damages under Mass. R. A. P. 25, arguing that the appeal was frivolous. We took the case on our motion believing that the procedural issue warranted our attention. In this circumstance we cannot say fairly that the issue was frivolous. The motion is denied.

[112] 4. *Conclusion.* The allowance of the motion to dismiss the appeal is affirmed. The defendant's motion for damages and costs is denied.

So ordered.

Appendix A

O'CONNOR. J. (dissenting, with whom Wilkins and Greancy, JJ., join). The Massachusetts Rules of Civil Procedure, effective July 1, 1974, and the Massachusetts Rules of Appellate Procedure, also effective July 1, 1974, were designed to clarify and simplify preexisting procedures and thereby eliminate traps to which numerous litigants had fallen prey in earlier times, causing them to lose significant rights. Today, in my view, the court returns to the spirit, if not the letter, of those earlier days by affirming the dismissal of the plaintiffs' underlying appeal based on an alleged violation of Mass. R. A. P. 9 (c) (2), as amended, 378 Mass. 935 (1979). That rule neither expressly nor impliedly gives the slightest hint that it applied to electronically recorded proceedings, and Mass. R. A. P. 8 (b) (3) (ii), as amended, 388 Mass. 1106 (1983), suggests that it does not. Moreover, the court's affirmance of the dismissal of the appeal is especially egregious because the dismissal appears to have been grounded on a finding by the judge, unaided by an evidentiary hearing, based on two affidavits that were substantially contradicted by a third affidavit. The retention or loss of appellate rights should not depend on the resolution, without an evidentiary hearing, of a critical and contested factual question about whether an undocketed and unwritten notice via the telephone was or was not given by a clerk to an appellant's counsel. I would reverse the order dismissing the appeal. To do so would not unfairly prejudice anyone. The same cannot be said for the court's order affirming the dismissal of the plaintiffs' appeal.

Rule 9 (c) (2) of the Massachusetts Rules of Appellate Procedure provides: "Notwithstanding any other obligation which these rules may impose, each appellant in a civil case [113] shall, within forty days after filing a notice of appeal, deliver to the clerk of the lower court either (i) a transcript of those portions of the transcript of the lower court proceedings which the appellant deems necessary for determination of the appeal, or (ii) a signed

statement certifying that the appellant has ordered such portions from the court reporter." The burden on an appellant within forty days to deliver a transcript or a signed statement that he has ordered a transcript from the court reporter, when the proceedings were recorded by a court reporter, is minimal. Counsel knows from the beginning the identity of the person from whom the transcript must be ordered. Counsel needs only to file a notice of appeal, decide what portion or portions of the transcript are needed, order the designated portions from the known court reporter, and certify that he or she has done so.

The court says that rule 9 (c) (2) also requires an appellant in a case in which the proceedings were electronically recorded, within forty days after the notice of appeal is filed, to deliver to the clerk either a transcript or a signed statement certifying that the tapes were being transcribed. *Ante* at 109-110. I do not agree that rule 9 (c) (2) applies to electronically recorded proceedings. Rule 9(c) (2) is silent concerning an appellant's duty to file anything in connection with a case in which the proceedings were recorded electronically.

In 1974, when the rules of appellate procedure went into effect, there was no rule dealing with electronically recorded proceedings. In 1983, when the rules were amended by adding rule 8 (b) (3) to deal with electronically recorded proceedings, no corresponding rules or amendments to rules 9 or 10 were adopted. Perhaps the court should formally adopt a rule for electronically recorded proceedings to be included in the rules of appellate procedure paralleling rule 9 (c) (2), and perhaps it should not. In any event, it has not done so. In this connection, it is noteworthy that rule 8 (b) (3) (ii), which was applicable in this case, requires an appellant to order from the clerk a cassette copy of the electronic recording at the same time he files a notice of appeal. The rule

[114] states in relevant part that "[t]he clerk shall promptly provide the cassette," and that, "[w]ithin fifteen days of receipt of the cassette from the clerk, appellant shall file in court and serve on each appellee a document which includes [among other information] the name, address, and telephone number of the individual or firm selected to prepare the transcript, provided that the appellant and each appellee have agreed to this choice and the appellant so states. If the appellant and appellees have not so agreed, said document shall also specifically notify the clerk to select the transcriber. . . . If the appellant has not designated the entire cassette [for transcription], then after twenty days have expired from the service upon the appellee of appellant's designation of transcript, the appellant shall promptly send or deliver to the transcriber the cassette provided by the clerk and a written order which states those parts of the cassette designated by the parties for transcription. . . ."

In this case, according to the affidavit of Edward J. Gierej, the truth of which the court accepted, Gierej, "criminal clerk" of the Orleans District Court, received the relevant cassette from Judge Zoll's office during the week of September 17, 1990, and he immediately notified appellants' counsel of its availability. Assuming that to be the case, slightly more than twenty-one days elapsed between the filing of the notice of appeal and counsel's receipt of notice that the cassette was available. Under rule 8 (b) (3) (ii), counsel then had fifteen days to designate the parts of the cassette he intended to have transcribed, and twenty more days to send the cassette to the selected transcriber with an order for transcription. Thus, even if the judge fairly accepted the clerk's affidavit and rejected the contradictory one filed by appellants' counsel, a proposition with which I disagree and discuss below, counsel was allowed by rule 8 (b) (3) (ii) a minimum of fifty-six days to order transcription of the cassette. Surely, in light of that

timetable, rule 9 (c) (2) should not be read as requiring appellants' counsel to have certified to the District Court within forty days after filing the notice of appeal that [115] he had ordered a transcription of the cassette or, as the court would have it, that "the tapes were being transcribed."[1]

In my opinion, rule 9 (c) (2) is not applicable to this case, and therefore the judge erred in concluding that the plaintiffs failed to comply with that rule. For that reason alone, the dismissal of the appeal should be reversed. However, that is not the only reason that the dismissal should not stand. Under Mass. R. A. P. 10 (c), as amended, 378 Mass. 937 (1979), dismissal of an appeal for failure to comply with rule 9 (c) (2) is permissible "only upon a finding of inexcusable neglect." The judge, for two reasons, it seems to me, exceeded the proper limits of his discretion in finding inexcusable neglect in this case. First, even if rule 9 (c) (2) should be construed as applying to electronically recorded proceedings, as the court holds, surely it is "excusable" for a litigant or counsel to have

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1 I am fully aware that, in *Hawkins v. Hawkins*, 397 Mass. 401, 406 (1986), a case in which the proceedings were recorded electronically, the court said without explanation, in an opinion that I joined, that "[t]he rules further required the plaintiff to deliver either a transcript or a signed statement certifying that the tapes were being transcribed, to the clerk or register's office, by September 15, forty days after her appeal was filed. Rule 9 (c) (2)." On further reflection, and instructed by the present case, I am now of the opinion, which I have expressed in the text, that rule 9 (c) (2) does not explicitly or implicitly refer to appeals in which the proceedings have been recorded electronically.

Certainly, it cannot be true that rule 9 (c) (2) requires, with respect to electronically recorded proceedings, that within forty days after the notice of appeal is filed, the appellant file the transcript or a statement certifying that "the tapes were being transcribed." Even in a proceeding recorded by a court reporter, the appellant need only file a transcript or a statement certifying that the appellant has *ordered a transcript* from the court reporter.

construed rule 9 (c) (2) otherwise in view of its express language and the provisions of rule 8 (b) (3) (ii). Secondly, as I discuss below, the judge's ultimate finding of inexcusable neglect appears to have been based on a subsidiary finding that the clerk's affidavit, and not appellants' counsel's, spoke the truth about whether the clerk had notified counsel's office by telephone that the cassette was available. That finding should not have been made without the benefit of an evidentiary hearing.

[116] The judge's memorandum of decision and order states: "This matter came on to be heard upon the defendant Margaret McCowen-Hanelt's motion to dismiss plaintiff's appeal, for the failure of the plaintiffs to comply with the provisions of Mass. R. A. P. 9 (c) (2); was argued by counsel and upon consideration thereof and a review of the pertinent affidavits and memoranda, this court finds that said failure by the appellants was inexcusable neglect. The appellants filed their notice of appeal on August 27, [1990,] together with a cassette copy request form. The cassette was received by the Orleans Division on September 17, 1990 which then notified counsel of the availability of the cassette. Thereafter by letter dated October 23, 1990, the Clerk-Magistrate received a request for the cassette, together with payment for it. See Mass. R. A. P. 8 (b) (3) (ii) and R. A. P. 9 (c) (2). It is therefore *Ordered* that appellee's motion to dismiss appeal be and is hereby *Allowed.*" Although the judge's reasoning is not entirely clear, it appears that the judge concluded that the appellants' failure to file a transcript or a statement certifying that "the tapes were being transcribed" (or at least transcription had been ordered) within forty days after August 27 was due to counsel's disregard of the clerk's notice that the cassette was available. The judge's reasoning appears to be that, if the appellants, in response to that oral notice, had promptly requested and paid for the cassette, they could have made the necessary arrangements for transcription of the cassette, as required by rule 8 (b) (3) (ii), within the forty-day

requirement of rule 9 (c) (2). Counsel's failure to proceed promptly in response to the telephone notice, according to the judge's apparent reasoning, was inexcusable, and therefore the nonconformity with rule 9 (c) (2) was inexcusable as well.

The defendants' motion to dismiss the appeal, filed on October 22, 1990, was accompanied by the affidavit of Peter S. Farber, counsel for the defendants. Mr. Farber stated under oath that he had spoken with Edward Gierej at the clerk's office at the Orleans District Court and that Gierej had told him that he, Gierej, "had reached the office of appellant's [117] counsel by telephone on September 17, 1990 and left the message that the cassette was ready to be picked up upon the payment of a . . . fee." On October 24, the appellants filed an opposition to the motion to dismiss their appeal, together with an affidavit of their counsel, Ansel B. Chaplin. In his affidavit, Mr. Chaplin stated, "I have been awaiting notice from the Clerk of Courts that the cassette tape of that portion of the transcript [the portion previously designated] is available. It was my understanding that a cassette would be sent to me along with a bill for its cost. . . . Up to this date I have not received the cassette tape with the bill or any notice from the Clerk that the cassette tape was completed and available. . . . The first notice I received pertaining to these cassette tapes was in the Affidavit of appellees' counsel, reflecting a purported telephone call and message to my office on September 17, 1990 from a Mr. Gierej of the Clerk's office. I received no telephone call nor any such telephone message either on or about that date or at any other time. When I am not available, an entry is made in a telephone log book if someone calls and is unable to reach me. A review of our telephone log book reflects no such call from a Mr. Gierej nor from anyone with that approximate name. . . . I have this date contacted the Clerk's Office and have taken the steps necessary to obtain the cassette tape promptly. Upon its receipt I will file the required Statement within 15 days as required by Rule 8 (b)(3)(ii) and

arrange for prompt transcription thereof." Edward J. Gierej, by an affidavit dated October 25, 1990, stated that he was the criminal clerk of the Orleans District Court and that, "[o]n September 17, 1990 Judge Zoll's office mailed to me the cassette ordered by plaintiffs' attorney. I received the cassette during the week of September 17th and telephoned the office of plaintiffs' attorney immediately upon my receipt of the cassette, which is my usual and customary practice. I spoke to woman at the attorney's office and left the message that the cassette was ready to be picked up or mailed. I also told the woman what the charge for the cassette was. . . . I did not thereafter make any reminder calls, and it is not my practice to do so. It is [118] not uncommon for cassettes to sit in my file cabinet for months, even sometimes years. I do not feel it is my responsibility to make the follow-up calls."

Despite the conflicting assertions in those affidavits, and without conducting an evidentiary hearing, the judge concluded that notice had been given as was claimed by Gierej and denied by Mr. Chaplin.[2] This court now concludes that "[t]he judge did not abuse his discretion by relying on the affidavits. The plaintiffs requested an evidentiary hearing only after the judge granted the motion to dismiss, so that issue is not properly raised." *Ante* at 111. I disagree. Elementary fairness required that, if the viability of the appeal was to depend on the resolution of that question of fact, the resolution should be made only after both sides had full opportunity to present witnesses and cross-examine opposing witnesses. Appellants' counsel had reason to expect nothing less.

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2 In connection with a motion for reconsideration filed on November 14, 1990, the appellants submitted further affidavits of four secretaries in counsel's Boston and Truro offices stating that neither office ever received telephone notice concerning the cassette's availability. The motion to reconsider was denied. The appellants' motion to depose New England Telephone Company, to verify whether the call had been made, was similarly denied.

The court cites no case that suggests that, in the circumstances present here, the appellants waived their right to an evidentiary hearing.

In my opinion, the appellants did not violate Mass. R. A. P. 9 (c) (2) and, in addition, the judge was not warranted in finding inexcusable neglect. I would reinstate the appeal.

Appendix A

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
Civil Docket No. 29373

GORDON S. RUSSELL, ET AL

V

BOARD OF APPEALS OF TRURO, ET AL

MEMORANDUM OF DECISION and ORDER

This matter came on to be heard upon the plaintiffs' motion to reconsider the allowance by this Court of defendant Margaret McOwen - Hanek's motion to dismiss plaintiff's appeal for failure of the plaintiffs to comply with the provisions of Mass. R. A. R. 9 (c)(2); was argued by counsel and upon consideration thereof and upon a further review of the pertinent affidavits and memoranda together with the additional memoranda of counsel, this court reaffirms its allowance of the motion to dismiss the appeal. See Memorandum of Decision and Order entered November 5, 1990.

Supplementary Findings of Fact

I find nothing in the record to indicate that plaintiff-appellants (1) delivered to the Clerk Magistrate a signed statement pursuant to Rule 9(c)(2)(ii); or (2) filed a motion to enlarge the time for docketing the appeal or a motion to permit the appeal to be docketed out of time; or (3) filed a motion to enlarge the time for taking the required action under Rule 9(c).

Appendix A

ORDER

It is therefore ORDERED that plaintiffs motion to reconsider allowance of motion to dismiss appeal be *denied.*

By the Court (Champagne, J.)

s/ Stephen N. Ross
Stephen N. Ross, Clerk-Magistrate

April 1, 1991

Appendix A

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss. DISTRICT COURT DEPARTMENT
ORLEANS DIVISION
Civil Docket No. 29373

GORDON S. RUSSELL, ET AL

V

BOARD OF APPEALS OF TRURO, ET AL

MEMORANDUM OF DECISION

AND

ORDER

This matter came on to be heard upon the defendant Margaret McCowen-Hanelt's motion to dismiss plaintiff's appeal, for failure of the plaintiffs to comply with the provisions of Mass. R. A. P. 9 (c)(2); was argued by counsel and upon consideration thereof and a review of the pertinent affidavits and memoranda, this court finds that said failure by the appellants was inexcusable neglect. The appellants filed their notice of appeal on August 27, 1990 together with a cassette copy request form. The cassette was received by the Orleans Division on September 17, 1990 which then notified counsel of the availability of the cassette. Thereafter by letter dated October 23, 1990, the Clerk-Magistrate received a request for the cassette, together with payment for it. See Mass. R. A. P. 8 (b)(3)(ii) and R. A. P. 9(c)(2).

It is therefore *Ordered* that appellee's motion to dismiss appeal be and is hereby *Allowed.*

Appendix A

By the Court, (Champagne, J.)
s/ Stephen N. Ross
Clerk-Magistrate

Entered: November 5, 1990

Appendix A

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH
OF MASSACHUSETTS
1412 Courthouse, Boston, Massachusetts 02108
(617) 725-8055

Ansel B. Chaplin, Esquire
Chaplin & Milstein
31 State St
Boston MA 02109

RE: No. SJC-05805

GORDON S. RUSSELL

VS.

BOARD OF APPEALS OF TRURO & another

NOTICE OF DENIAL OF PETITION FOR REHEARING

The Petition for Rehearing filed in the above captioned case has been considered by the court and is denied.

Very truly yours,

Jean M. Kennett, Clerk

Dated: August 5, 1992

To: Ansel B. Chaplin, Esquire
Charles S. Cohen, Esquire
Edward E. Veara, Esquire
Peter S. Farber, Esquire

APPENDIX B — EXCERPTS FROM MASSACHUSETTS RULES OF APPELLATE PROCEDURE

Rule 8

THE RECORD ON APPEAL

(a) Composition of the Record on Appeal. The original papers and exhibits on file, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the lower court shall constitute the record on appeal in all cases. In a civil case, in an appeal from the appellate division, the original papers and exhibits shall include the report of the trial judge to the appellate division with any exhibits made a part of such report.

(b) The Transcript of Proceedings.

(3) Electronically Recorded Proceedings.

(i) Applicability. Rule 8 (b) (3) applies to proceedings which were recorded electronically on equipment under the control of the court and which were not recorded by an official court reporter.

(ii) Duties of the Appellant and of the Clerk; Selection of Transcriber. If the appellant deems all or part of the electronic recording necessary for inclusion in the record, the appellant shall, simultaneously with filing a notice of appeal, order from the clerk of the lower court, in accordance with any rule or established policy of the court, a cassette copy of the electronic recording, which is hereinafter called "the cassette." The clerk shall promptly provide the cassette. . . .

Appendix B

Rule 9

ASSEMBLY AND TRANSIMISSION OF THE RECORD: EXHIBITS

(c) Appellant's Obligation.

(2) Civil Cases. Notwithstanding any other obligation which these rules may impose, each appellant in a civil case shall, within forty days after filing a notice of appeal, deliver to the clerk of the lower court either (i) a transcript of those portions of the transcript of the lower court proceedings which the appellant deems necessary for determination of the appeal, or (ii) a signed statement certifying that the appellant has ordered such portion from the court reporter. Upon receiving the transcript, the appellant in a civil case shall forthwith deliver it to the clerk of the lower court.

Rule 10

DOCKETING THE APPEAL

(3) In General.

(c) Dismissal for Failure of Appellant in a Civil Case to Comply with Rule 9 (c) or Rule 10 (a). If any appellant in a civil case shall fail to comply with Rule 9 (c) or Rule 10 (a) (1) or (3), the lower court may, on motion with notice by any appellee, dismiss the appeal, but only upon a finding of inexcusable neglect; otherwise, the court shall enlarge the appellant's time for taking the required action. If, prior to the lower court's hearing such motion, the appellant shall have cured the noncompliance, the appellant's compliance shall be deemed timely.